Supreme Court, U. S.
FILED
SEP 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-424

BEVERLY G. CUNNINGHAM,

Petitioner

V.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

JOHN C. LOWE
CRAIG T. REDINGER
Lowe and Gordon, Ltd.
409 Park Street
Charlottesville
Virginia 22901
(804-296-8188)

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS.	i
TABLE OF CITATIONS.	ii
OPINION BELOW.	2
JURISDICTION.	2
QUESTION PRESENTED.	2
STATEMENT OF THE CASE.	3
REASONS FOR GRANTING CERTIORARI. .	6
1. The importance of the question.	6
2. The trial court's action violates this Court's ruling in Herring v. Herring. . . .	9
CONCLUSION.	13
APPENDIX.	14
I. MOTION FOR RETRIAL. . .	14
II. MOTION FOR ACQUITTAL. .	17
III. ORDER DENING THE APPEAL FROM THE VIRGINIA SUPREME COURT.	19
IV. PORTION OF THE TRANSCRIPT.	20
V. NOTICE OF TIMELY APPEAL.	23
PROOF OF SERVICE.	25

TABLE OF CITATIONS

	PAGE
Argensinger v. Hamlin, 407 U.S. 25 (1972).	6
Gideon v. Wainwright, 372 U.S. 335 (1963).	6
Herring v. Herring, 422 U.S. 853 (1975).	9,10,11
Lee v. Commonwealth, 200 Va. 233, 105 S.E. 2d 152 (1958). .	5
OTHER	
Sixth Amendment to the United States Constitution.	2,6,10
Fourteenth Amendment to the United States Constitution. .	2,6,10

IN THE

SUPREME COURT OF THE UNITED STATES

No.

BEVERLY G. CUNNINGHAM,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Virginia entered in this matter on June 15, 1978.

OPINION BELOW

The Supreme Court of Virginia entered an order dismissing Cunningham's Appeal to that Court, finding no reversible error in the judgment of the trial court. This order is set forth in the Appendix, infra, at 19.

JURISDICTION

Jurisdiction of this matter is conferred on the Supreme Court of the United States by virtue of 28 U.S.C. §1257.

QUESTION PRESENTED

1. Whether the trial court violated Cunningham's Constitutional rights as guaranteed by the Sixth Amendment of the Constitution as applied to the states by the Fourteenth Amendment in deciding his guilt prior to hearing defense counsel's closing arguments?

STATEMENT OF THE CASE

Beverly G. Cunningham was indicted for breaking and entering and grand larceny in Lynchburg, Virginia, on October 3, 1977. On October 21, 1977, the Honorable O. Raymond Cundiff, sitting without a jury heard the evidence, which consisted entirely of accomplice testimony and defendant's alibi witnesses.

At the conclusion of the evidence, and just as the Commonwealth's Attorney had begun his summation the trial judge interrupted with the suggestion that the defendant submit to a polygraph test. The colloquy between the judge and Cunningham's defense counsel, Mr. Abbitt, is found in the Appendix at p. 20 :

> Mr. Petty [Commonwealth's Attorney]: Your Honor, the only thing. . . .

The Court: Mr. Abbitt, let me make a suggestion. If you want to do it I'll continue this case and have this individual submit to a lie detector test and have it received as evidence.

Mr. Abbitt: I could not quite hear hear you.

The Court: I said if you want to I'll continue the case if you want your client to submit to a lie detector or polygraph test and let that be received as evidence as to whether he is guilty of that.

Mr. Abbitt: I told him Judge and he says that he is telling the truth and he wants to submit to it.

The Court: Well, we will continue it and have the lie detector test be set-up and be stipulated by both of you and him on a stipulation that the results will be received as evidence in the case.

The case was continued until December 2, 1977.

On December 2, 1977 Cunningham appeared with his present counsel and filed a motion for acquittal and a motion for a mistrial (Appendix at pp. 17, 14). Counsel argued in support of the motion that the

request by the court for a polygraph test established that the court had reasonable doubt as a matter of law. Counsel further argued that the trial judge had interfered with Cunningham's right to an impartial trier-of-fact by requesting polygraph evidence which is completely inadmissible under Virginia Law. Lee v. Commonwealth, 200 Va. 233, 105 S.E. 2d 152 (1958). The court overruled the motion, noting that it had already decided Cunningham's guilt at the time the court made the polygraph suggestion. (Appendix at p. 21):

> The Court: I was convinced beyond a reasonable doubt that he was guilty, but I wanted to give him an opportunity to have a polygraph test should he want that and I would consider that and it could change my mind, but I was convinced at the time I made the suggestion beyond a reasonable doubt that he was guilty.

Defendant then moved for a mistrail which was also overuled. The

court then permitted defendant's counsel to argue the case whereupon Cunningham was found guilty on both counts and, on December 19, 1977, sentenced to twelve months in jail on each count.

Timely Notice of Appeal was filed (Appendix at p. 23).

REASONS FOR GRANTING CERTIORARI

1. The importance of the question.

One of the most fundamental principles of our system of criminal justice is the accused's right to the assistance of counsel. The Sixth Amendment to the Constitution as applied against the States by the Fourteenth Amendment promulgates and solemnifies this basic requirement. Gideon v. Wainright, 372 U.S. 335 (1963); Argensinger v. Hamlin, 407 U.S. 25 (1972). A criminal defendant is entitled to have his

case heard by an unbiased trier-of-fact and to have the assistance of competent counsel during that presentation.

The events in the case at bar pose a clear threat to the continued vitality of this fundamental constitutional principle. Cunningham was convicted upon the testimony of alleged accomplices and he offered alibi witnesses on his own behalf. The importance of defense counsel's agrument is paramount in such a case where the issues are not technical legal ones, but the basic credibility of the witnesses. Such a case provides defense counsel with the paradigm opportunity to exercise those skills unique to the closing argument. His ability to focus on specific characteristics of the witnesses presentation and to persuade the judge of their importance in support of his client's position ought not to be infringed.

The effective assistance of counsel requires that counsel be given the opportunity to argue the case in the best light for his client before the trier-of-fact makes a decision, to point out inferences to be drawn from the evidence which might not appear at first hearing, to point out particular portions of the evidence which may not have impressed the trier-of-fact and to argue the consequences of the facts in light of the prevailing law. To allow a trier-of-fact to find a defendant guilty before final argument by counsel destroys counsel's most effective defense tool, the ability to persuade. Clearly, the elimination of that opportunity by the judge's premature decision impermissibly restricts the function of defense counsel and denies the defendant his constitutional protections.

2. The trial court's action violates this Court's ruling in Herring v. New York.

In 1975, this Court decided Herring v. New York, 422 U.S. 853 and examined at great length the right of a defendant to assistance of counsel. The only difference between the case at bar and Herring is that in Herring this Court construed a New York State statute which granted the trial court discretion to permit the parties to deliver summations. However, there is no fundamental difference between the denial of the constitutionally mandated privilege in Herring and the denial which took place in the case at bar by judicial fiat. In both instances, the accused's right to counsel was unconstitutionally violated.

The ruling in Herring was based upon the constitutional requirements of

the Sixth and Fourteenth Amendments. Though in Cunningham's case, there was no statute under which the judge acted, the judges' actions in both the case at bar and in Herring are analogous. They both denied the defendants their right to counsel.

This Court in Herring found the fundamental right to a closing summary of the evidence inherent in the English criminal system.

> 'In the Sixteenth and Seventeenth Centuries when notions of compulsory process, confrontation and counsel were in their infancy, the essence of the English criminal trial was argument between the defendant and counsel for the 'crown.'

Herring v. New York supra., at 860. The American system has adopted that rule, which prevails by the great weight of authority in both federal and state jurisdictions. This Court recognized the

pervasiveness and constitutional dimensions of the rule, stating,

> . . .[T]he overwhelming weight of authority in both federal and state courts holds that a total denial of the opportunity for final argument in a non-jury criminal trial is a denial of the basic right of the accused to make his defense.

Herring v. New York, supra., at 859. Defendant Cunningham was not denied the opportunity for closing argument by a judge's action pursuant to a statute as in Herring. However, there is no substantive distinction between this case and that of the defendant in Herring. This Court's opinion in Herring was directed at the denial of effective assistance of counsel, a denial which is just as inimical and equally violative of the Constitution whether pursuant to statute or to judicial fiat. The judge's decision as to Cunningham's

guilt prior to agrument totally foreclosed the defendant's right to closing argument just as if a statute had prevented it.

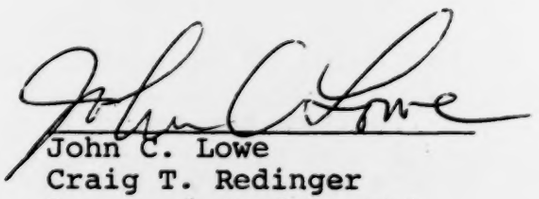
There is clearly a basic constitutional right to closing argument by defense counsel. This right cannot be abrogated by statute nor denied by judicial intereference. The trial court precluded Cunningham from exercising this fundamental right, for which action Cunningham's conviction should be reversed.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be granted.

Respectfully submitted,

BEVERLY G. CUNNINGHAM



John C. Lowe
Craig T. Redinger
Lowe and Gordon, Ltd.
409 Park Street
Charlottesville, Virginia 22901
(804 296-8188)
September 11, 1978

APPENDIX

I. MOTION FOR A MISTRIAL

VIRGINIA
IN THE CIRCUIT COURT
OF THE
CITY OF LYNCHBURG

COMMONWEALTH OF VIRGINIA,

Plaintiff

v.

BEVERLY G. CUNNINGHAM,

Defendant

MOTION FOR A MISTRIAL,
NEW TRIAL AND RECUSAL

Comes now the defendant, Beverly G. Cunningham, by counsel, and represents unto this Honorable Court as follows:

1. At the trial of this case on October 21, 1977, before the court without a jury, and before the entry of judgment, this Court requested that defendant submit to a polygraph test.

2. Counsel for defendant and the Commonwealth agreed to have the defendant submit to such a test and to enter the results in evidence.

3. The request for a polygraph examination of the defendant in this action seeks evidence which is inadmissible under Virginia law and violates defendant's rights under the Fifth, the Fourteenth Amendments to the Constitution of the United States. Skinner v. Commonwealth, 212 Va. 260 (1971); Barber v. Commonwealth, 206 Va. 241 (1965) and Lee v. Commonwealth, 200 Va. 233 (1959).

4. The request and acquiescence in that request on the part of the defendant has so tainted the proceedings before this Court that the defendant can no longer be afforded a fair trial.

WHEREFORE, defendant moves this Court for a mistrial and for the granting

of a new trial before another judge of this Circuit.

Respectfully submitted,

BEVERLY G. CUNNINGHAM

By Counsel

/s/ Craig T. Redinger
John C. Lowe
Lowe and Gordon, Ltd.
409 Park Street
Charlottesville, Virginia 22901
(804 296-8188)

/s/ Watkins M. Abbitt
Attorney at Law
Appomattox, Virginia 23522

MAILING CERTIFICATE

I hereby certify that on or before the 2nd day of December , 1977, I mailed or delivered a true copy of the foregoing Motion for a Mistrial, New Trial and Recusal to William Petty, Commonwealth Attorney, Post Office Box 1360, Lynchburg, Virginia, 24505.

/s/ Craig T. Redinger

II. MOTION FOR ACQUITTAL

VIRGINIA
IN THE CIRCUIT COURT
OF THE
CITY OF LYNCHBURG

COMMONWEALTH OF VIRGINIA,

Plaintiff

v.

BEVERLY G. CUNNINGHAM,

Defendant

MOTION FOR JUDGMENT OF ACQUITTAL

Comes now the defendant, Beverly G. Cunningham, by counsel, and represents unto this Honorable Court as follows:

1. This court upon hearing evidence at the trial for this case and upon entering judgment requested that defendant submit to a polygraph examination.

2. This court's request indicates as a matter of law that the court has reasonable doubt after hearing all the

evidence as to defendant's guilt.

3. Therefore, this court should have acquitted defendant on the day of trial.

WHEREFORE, defendant requests this court to enter a judgment of acquittal.

Respectfully submitted,

BEVERLY G. CUNNINGHAM

By Counsel

/s/ Craig T. Redinger
John C. Lowe
Lowe and Gordon, Ltd.
409 Park Street
Charlottesville, Virginia 22901
(804 296-8188)

/s/ Watkins M. Abbitt
Attorney at Law
Appomattox, Virginia 23522

MAILING CERTIFICATE

I hereby certify that on or before the 2nd day of December, 1977, I mailed or delivered a true copy of the foregoing

Motion for Judgment of Acquittal to William Petty, Commonwealth Attorney, Post Office Box 1360, Lynchburg, Virginia 24505.

Craig T. Redinger

III. ORDER DENYING THE APPEAL FROM THE VIRGINIA SUPREME COURT

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 15th day of June, 1978.

BEVERLY G. CUNNINGHAM, Appellant,

against Record No. 780369
Circuit Court No. 32A

COMMONWEALTH OF VIRGINIA, Appellee.

From the Circuit Court of the City of Lynchburg

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

/s/

IV. PORTION OF THE TRANSCRIPT

[T76]

we had to walk.

MR. ABBITT: I believe that's all.

THE COURT: That's all. Any other rebutal?

MR. PETTY: No.

THE COURT: Do you gentleman want to be heard on the matter?

MR. PETTY: Your Honor, the only thing---

THE COURT: Mr. Abbitt let me make a suggestion. If you want to do it I'll continue this case and have this individual submit to a lie detectors test and have it received as evidence.

MR. ABBITT: I couldn't quite hear you.

THE COURT: I said if you want to I'll continue the case if you want your client to submit to a lie detectors or polygraph test and let that be received as evidence as to whether he's guilty of that.

MR. ABBITT: I told him Judge and he says he's telling the truth and he wants to submit to it.

THE COURT: Well we'll continue it and have the lie detector test be set up and be stipulated by both of you and him on a stipulation that that the results be received as evidence in the case. Come back November 15.

[Transcript of motions pg. 4]

it and---

THE COURT: I was convinced beyond a reasonable doubt that he was guilty, but I wanted to give him an opportunity to have a polygraph test should he want that I would consider that and it would change my mind, but I was convined at the time I made the suggestion beyond a reasonable that he was guilty.

MR. REDINGER: Do I take it then that--

THE COURT: I'll deny your motion.

MR. REDINGER: You deny the motion?

THE COURT: Yes sir.

MR. REDINGER: We have a second motion Your Honor.

THE COURT: All right.

MR. REDINGER: The court has the second motion.

THE COURT: All right, let me see.

MR. REDINGER: And that Your Honor is that the polygraph evidence is inadmissible as a matter of law in Virginia; that no cases in Virginia have allowed even a stipulation between counsel that a polygraph would be admissible, therefore the defendant would be entitled to a mis-trial or a new trial.

V. NOTICE OF TIMELY APPEAL

VIRGINIA
IN THE CIRCUIT COURT
OF THE
CITY OF LYNCHBURG

COMMONWEALTH OF VIRGINIA,

Plaintiff

v.

BEVERLY G. CUNNINGHAM,

Defendant

NOTICE OF APPEAL

Comes now the defendant, Beverly G. Cunningham, by Counsel, pursuant to Rule 5:6 of the Supreme Court of Virginia, and notes his appeal from the judgment of court entered this 19th day of Decmeber, 1977. A transcript will be filed with this court pursuant to Rule 5:9 to become part of the record in accordance with Rule 5:8.

BEVERLY G. CUNNINGHAM

By Counsel

/s/ Craig T. Redinger
John C. Lowe
Lowe and Gordon, Ltd.
409 Park Street
Charlottesville, Virginia 22901
(804 296-8188)

/s/ Watkins M. Abbitt
Attorney at Law
Appomattox, Virginia 24522

MAILING CERTIFICATE

I hereby certify that a true copy of the foregoing Notice of Appeal was mailed this 28 day of December, 1977, to William Petty, Commonwealth's Attorney, P. O. Box 1360, Lynchburg, Virginia 24505.

Craig T. Redinger

PROOF OF SERVICE

I, John C. Lowe, a member of the Bar of this Court, do hereby certify that on or before September 13, 1978, I mailed, postage prepaid, three copies of this Petition for Writ of Certiorari to William Petty, Commonwealth's Attorney, P. O. Box 1360, Lynchburg, Virginia 24505.

John C. Lowe